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In the

Supreme Court of the United States

TRENDI SPORTSWEAR, INC.,

Petitioner,

v.

BANK OF INDIA, INDU CRAFT, INC.,
The BANK OF BARODA,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a bankruptcy court's judgment against the debtor entered pursuant to a reorganization plan, which judgment and plan have become final and binding, be held to be unenforceable? Is such a decision, which unravels the entire reorganization plan, an impermissible collateral attack on the bankruptcy court's decisions and so far a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power?

2. Are the lower Courts' decisions – that a defendant third party plaintiff's assertion of direct claims against a fourth-party defendant under Rule 14, Fed. R. Civ. P., do ***not*** relate back to the commencement of the fourth-party action although they arise out of the same transactions – in direct conflict with the decision of New York's highest Court in Duffy v. Horton Memorial Hospital, 66 N.Y.2d 473, 497 N.Y.S.2d 890, 488 N.E.2d 820 (1985)?

3. Can a third-party plaintiff's claims against a fourth-party defendant under Rule 14, Fed. R. Civ. P., be held to accrue on 3 different dates for purposes of statute of limitations depending on whether such claims were (a) not formally asserted, or (b) asserted in an amendment to the existing third-party complaint, or (c) asserted in a separate pleading in the same proceeding, although the claims arise out of the same transactions underlying the timely fourth party complaint? Is this an important question of federal law that has not been, but should be,

settled by this Court?

PARTIES TO THE PROCEEDING

Trendi Sportswear, Inc. ("Trendi") and Indu Craft, Inc. ("Indu Craft") are both New York corporations, with no parent or subsidiary corporations. No publicly held corporations own 10 percent or more of the stock of either corporation.

Bank of Baroda ("Baroda") is a bank organized under the laws of India. It is owned and controlled by the Government of India.

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Bank of India v. Trendi Sportswear, Inc., 64 Fed. Appx. 827, 2003 U.S. App. LEXIS (2nd Cir. May 15, 2003), A-1a.

Bank of India v. Trendi Sportswear, Inc., 2002 U.S. Dist. LEXIS 894 (S.D.N.Y. Jan. 18, 2002), A-18a ("January 18th Order")

Bank of India v. Trendi Sportswear, Inc., 2002 U.S. Dist. LEXIS 14801 (S.D.N.Y. Aug. 12, 2002), A-7a ("August 12th Order").

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). The United States Court of Appeals for the Second Circuit entered its decision on Trendi's and Indu Craft's appeals on May 15, 2003. Trendi and Indu Craft petitioned that Court separately for rehearing, and rehearing *en banc*. Both petitions were denied by orders entered on July 7, 2003. This petition is filed within 90 days of the date of entry of those orders denying rehearing, and is hence, timely. Rule 13.1, Sup. Ct. R.

RELEVANT PROVISIONS

11 U.S.C. §§ 524 (a)(1), (e); 1123(b)(3)(B); 1129(a)(7)(A) (ii); Rule 14, Fed. R. Civ. P.

STATEMENT

Trendi petitions for a writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Second Circuit which affirmed, by a Summary Order, the Judgment of the United States District Court for Southern District of New York (Hon. John S. Martin, Jr., J.), entered April 11, 2002, A-129a, and the two underlying orders, January 18, 2002, A-18a, and August 12, 2002, A-7a, which dismissed Indu Craft's Amended Fourth-Party Complaint, and Trendi's Second Third Party Complaint respectively. The Second Circuit gave no reasons of its own, but simply affirmed "***largely*** for the reasons stated in the opinions of the District Court," A-6a (emphasis added).

The Underlying Action, 1990 Stay, Jury Verdict Against Baroda For Bad Faith Lender Liability in the 1987 Action

BOI (Baroda's sister bank)[1], brought the underlying action against Trendi in September 1989 based on Trendi's alleged default on its financial obligations to BOI. Trendi in turn asserted third party claims against its supplier and then-sister corporation, Indu Craft, asserting that Trendi's default was caused by Indu Craft's failure to supply Trendi with ladies' garments as contracted for. Indu Craft impleaded Baroda in a fourth party complaint, asserting derivative claims for bad faith lender liability.

The District Court stayed this action in 1990, at Baroda's instance, pending conclusion of Indu Craft's

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[1]BOI has not participated in any proceedings herein for several years, and is accordingly, not a party to these proceedings.

earlier action against Baroda ("the 1987 Action"). Eventually, Indu Craft prevailed in the 1987 Action, a Manhattan jury holding that Baroda had acted maliciously and in bad faith in connection with Indu Craft's credit facility. After further proceedings and appeals, when it came time to pay that judgment, Baroda acted in concert with BOI to keep those funds from Indu Craft and to deposit them in Court, which led to a slew of claims against Indu Craft and forced it into bankruptcy. Meanwhile, in this action, Baroda's sister bank BOI obtained judgment against Trendi for over $2.4 million in 1991. That judgment remains unsatisfied.

The Bankruptcy Proceedings: Reorganization Plan Confirmed Based Substantially On Recovery On Fourth Party Claims Herein

In Indu Craft's Bankruptcy proceedings, it submitted a reorganization plan to the Bankruptcy Court on March 24, 1999. That plan ***clearly*** contemplated prosecution of Indu Craft's fourth party claims herein, and payment to creditors from any recovery therefrom:

> Trendi, ANZ and Hemant Mehta, the holders of Claims in Class 5, ***shall receive their net proceeds of any recovery in Baroda II [i.e., the fourth party claims in this action]***, after deduction for the reimbursement to Tze Wong Consultants, Ltd., of its funding of the Plan, ***the funding of the Baroda II litigation*** pursuant to a future agreement, legal fees, costs and disbursements.

A-87a-88a ¶5.2. It also proposed to discharge Indu Craft

from all liability "except as otherwise provided under the Plan," A-77a ¶9.1.

Trendi agreed to that plan on the express condition that (a) Indu Craft consented to entry of judgment in Trendi's favor in the amount adjudicated by the Bankruptcy Court, and (b) Trendi "shall receive" the net proceeds of any recovery in the fourth party claims in this action, A103a-104a¶1.

Five days later, on March 29, 1999, a modification agreed to between all the creditors and Indu Craft, and accepted by the Bankruptcy Court ("so ordered") provided that

a. a "new loan" of $600,000 would be made to Indu Craft for, *inter alia*, "the prosecution of post-Effective Date claims, including but not limited to," the fourth party claims herein A-85a ¶1.37;
b. Indu Craft would issue promissory note and security interest in all its property, "including but not limited to, the proceeds generated from [the fourth party claims in this action]," A-87a¶ c);
c. For repayment of the "new loan", "Tze Wung shall receive the first proceeds, in the amount of $500,000, generated by the successful prosecution or settlement of [the fourth party claims in this action]. . ." A-87a ¶(d);
d. Indu Craft "agrees to consent to judgment being entered against it in the third party action in Baroda II [i.e., this action] for the amount of Trendi's claim as determined by the Bankruptcy Court," A-88a ¶5.2;

e. Indu Craft "shall utilize" the new capital loan for paying creditors and the balance for the prosecution of claims "including but not limited to [the fourth party claims in this action]", A-88a ¶12(b).

The Bankruptcy Court confirmed the proposed reorganization plan as modified on the same day, A-101a. It made the requisite factual findings required by the Bankruptcy Code, and also entered the usual order that "Except as otherwise provided in the Modified Plan or a Final Order of the Bankruptcy Court," any judgment on a discharged debt was "null and void and of no force and effect", A-96a ¶F(1)(c).

Thereafter, the Bankruptcy Court adjudicated Trendi's claims against Indu Craft as required under the Plan. ***About ten months later, on January 18, 2000, that Court entered judgment in favor of Trendi against Indu Craft*** in the amount of $21,101,348.47, A-45a ("Bankruptcy Judgment").

While Baroda participated in Indu Craft's bankruptcy proceedings, A-105a-106a, disputed payments, A-111a-116a, and received notices even concerning the Reorganization Plan, A-108a-112a, it never disputed the Bankruptcy Court's findings or raised any issue concerning the Plan.[2]

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[2]Bankruptcy law requires any party in interest to object to a proof of claim or be forever bound by it. 11 U.S.C. §502(a); Rosenbaum v Dutton, 203 F 838 (8th Cir. 1913) (Parties in interest" include all persons who have interest in *res* which is to be administered); Power Five v GMC *(In re Automotive Armature Co.)* 219 BR 513 (S.D.Ind. 1998).

Proceedings Before the District Court, Trendi's Direct Claims Against Baroda

Meanwhile, in this action, the District Court lifted the 1990 stay, and awarded summary judgment to Baroda against Indu Craft based on *res judicata*. Upon reversal of that order by the Second Circuit, Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428 (2nd Cir. 2000), Indu Craft amended its complaint as of right to assert RICO claims based upon evidence unearthed in criminal proceedings in India. Separately, Trendi served a Second Third Party Complaint asserting direct claims against Baroda based upon the same transactions.

Baroda moved for dismissal of Indu Craft's Fourth Party Complaint based on Indu Craft's alleged "discharge" under the Plan. By its January 18th Order, the District Court granted this motion, holding that "since Indu Craft had been discharged [by the Bankruptcy Court's order approving the Plan in March 1999] of its obligation to pay Trendi the [subsequent] judgment entered against it in the Bankruptcy proceeding and Trendi is barred from seeking to enforce that judgment against Indu Craft, Indu Craft's action for indemnification cannot succeed, as a matter of law, and must be dismissed," A-25a. Accordingly, it entered final judgment after dismissing Indu Craft's claims.

Trendi sought to vacate the final judgment because its direct claims against Baroda were still pending and unanswered. The District Court sought briefing on two specific issues: whether Trendi's claims against Baroda were time barred; and whether Trendi's impleader of Indu Craft was proper. After due briefing, by its August 12th Order, the District Court dismissed Trendi's direct claims against Baroda as time-barred.

According to the District Court, Trendi could assert direct claims against Baroda under Rule 14, Fed. R. Civ. P., in a separate pleading, but those claims were time-barred because the underlying actions took place in 1987. Moreover, Trendi's claims could not relate back because Trendi had to reopen the Bankruptcy Judgment against Indu Craft (presumably in the Bankruptcy Court) to assert a claim directly against Baroda in this action. Trendi had not done so, and could not do so now; hence, Trendi's claims could not relate back under Rule 15(c), Fed. R. Civ. P., and were untimely. Trendi appealed but the Second Circuit affirmed both opinions "largely" for the District Court's reasons.

Trendi petitions for a writ of certiorari. First, the District Court's January 17th Order unravels the entire Reorganization Plan approved by the Bankruptcy Court, and is an impermissible collateral attack on the Plan. This radical and unprecedented departure from well-settled law and practice was sanctioned by the Second Circuit. Second, the District Court's August 7th Order refusing to relate back Trendi's direct claims against Baroda based upon the same transactions as Indu Craft's claims is in direct conflict with the decision of the New York Court of Appeals in Duffy, 66 N.Y.2d 473, 497 N.Y.S.2d 890, 488 N.E.2d 820. Third, the time when a third party plaintiff's direct claim against a fourth party defendant accrues is an important issue of federal law which should be settled by this Court. The lower Courts' decisions make this depend entirely on the ***form*** in which the claim is raised, if it is asserted at all.

Original Jurisdiction of the United States District Court for the Southern District of New York was based upon diversity of citizenship, 28 U.S.C. §1332. Bank of India, the original plaintiff, was a citizen of India, while

Trendy was a citizen of New York, and the amount in controversy exceeded $75,000. Jurisdiction over the third-party and fourth party claims was based upon supplementary jurisdiction, 28 U.S.C. §1367, and Rule 14, Fed. R. Civ. P.

REASONS FOR GRANTING THE WRIT

I. The Courts' Decisions Unraveled the Entire Reorganization Plan Duly Confirmed by the Bankruptcy Court and Which Plan Had Become Final and Binding

The lower Courts' decisions used one clause of the Bankruptcy Court's order which confirmed the Plan to eviscerate that very Plan, and to render meaningless a judgment entered pursuant to the express terms of that Plan by the Bankruptcy Court itself. As detailed below, this is so radical a departure from settled law and practice that, to borrow Justice Scalia's words, "the phenomenon calls into question whether . . . it any longer makes sense to talk of 'a government of laws, not of men.'" Patterson v. Shumate, 504 U.S. 753, 766 (1992)

A. The Plan's Central Plank Was The Continued Prosecution of, and Potential Recovery From, Indu Craft's Fourth Party Claims Herein

No serious question can exist that Indu Craft's asset – its fourth party claim against Baroda herein – was pivotal to the Plan. Trendi and other creditors agreed to the Plan relying on this asset, and the orders of the Bankruptcy Court thereon. The lower Courts' decisions hold, in effect, that the Bankruptcy Court took away with one hand what it gave with the other.

Extremely telling, the Bankruptcy Court's Order required another creditor, Tze Wung, to advance new funds ($500,000) to finance prosecution of Indu Craft's claims here. A-87a ¶5.1(c). This order was ***clearly*** within its jurisdiction, and within the express terms of the bankruptcy statute. 11 U.S.C. §1123(b)(3)(B) ("a plan may . . . provide for . . . the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any . . . claim or interest"); Citicorp Acceptance Co. v. Robison (In re Sweetwater), 884 F.2d 1323, 1327 (10th Cir. 1989); Duvoisin v. East Tenn. Equity Ltd. (In re Southern Indus. Banking Corp.), 59 Bankr. 638, 642 (Bankr. E.D. Tenn. 1986) ("[The] aim [of section 1123(b)(3)(B)] was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action . . . Thus, the statute was in furtherance of the purpose of preserving all assets of the estate while facilitating confirmation of a plan.").

Indeed, if such post-confirmation prosecution of claims was proscribed by the very confirmation of the Plan, as the Ninth Circuit observed,

> debtors undoubtedly would delay filing plans of reorganization until completing all potential litigation, a result that would contravene the Bankruptcy Code's goal of quick and equitable reorganization. Cf. Tennessee Wheel & Rubber Co. v. Captrol Corp. Air Fleet (In re Tennessee Wheel & Rubber Co.), 64 Bankr. 721, 727 (Bankr. M.D. Tenn. 1986) ("Defendants' theory would not permit the administration of bankruptcy estates in the common

> situation . . . where the general unsecured claimholders have accepted cash soon after confirmation, but other classes of creditors and interestholders await payment for months or years after confirmation. . . . [That result would conflict with] Chapter 11[, which] provides debtors with great flexibility in the design and execution of plans of reorganization."), aff'd, 75 Bankr. 1 (M.D. Tenn. 1987)

Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 808 (9th Cir. 1994). Accord, Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548 (3rd Cir. 2003); McFarland v. Leyh (In re Texas Gen. Petroleum Corp.), 52 F.3d 1330 (5th Cir. 1995). While the lower Courts held that Indu craft was not bound to prosecute these claims here, A-25a, and that ***Trendi*** "may have made an ill-advised agreement, which did not take account of New York law regarding indemnification," A-14a, it didn't explain why the Bankruptcy Court ordered Tze Wung to finance this litigation.

So also, ***much after the discharge***, the Bankruptcy Court held hearings, quantified Indu Craft's liability to Trendi, and entered judgment thereon ***about 10 months later***. The lower Courts' decision now hold that the Bankruptcy Judgment was a worthless piece of paper.

B. The Reorganization Plan Was Not Subject to Selective Nullification by the lower Courts

The District Court was exercising its Diversity Jurisdiction under 28 U.S.C. §1332. As such, the District Court was "in effect, only another court of the State [where it sits]. . . ." Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (citations omitted); accord, Levinson v. Deupree, 345 U.S. 648, 653 (1953). The District Court was ***not*** sitting in appeal under 28 U.S.C. §158 over the Bankruptcy Court's decisions; that appellate jurisdiction lies ***only*** when the mandated procedure is followed with prescribed filings. See Smith v. Barry, 502 U.S. 244, 248 (1992) (appellate court's rules concerning notice of appeal "are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review.").

Indisputably, the decisions of a court of competent jurisdiction ***must*** be respected in all collateral proceedings. As the Fourth Circuit observed in a marginally different context,

> The problem with the reasoning of New Horizon is that it ignores the fact that the order of the bankruptcy court of February 6, 1997 was a final order because it was not appealed from on or before 10 days thereafter pursuant to 28 U.S.C. § 158(a) and § 158(c) and Rule 8002 of the Bankruptcy Rules. See also Bankruptcy Rule 9020 and In re Walters, 868 F.2d 665 (4th Cir. 1989). Thus, the claim in the complaint in this case that jurisdiction is established under 28 U.S.C. § 1334(b) as a

> related to case under Title 11 because of its claim that the defendants were guilty of civil contempt of the Bankruptcy Court depends for its success on a collateral attack on a final order of the bankruptcy court, which two opinions of the United States Supreme Court, Celotex Corp. v. Edwards, 514 U.S. 300 (1995), and Oriel v. Russell, 278 U.S. 358 (1929), have decided is not permissible.

New Horizon v. Jacobs, 231 F.3d 143, 152 (4th Cir. 2000)

Finality of orders concerning reorganization plans is particularly significant, given the third party interests at stake. As the Court observed in Corbett v. MacDonald Moving Services, Inc., 124 F.3d 82 (2nd Cir. 1997),

> ***These finality interests are particularly important in the bankruptcy context, where numerous contending claims and interests are gathered, jostle[d], and are determined and released.*** . . . Thus MacDonald's contribution did confer a benefit on the unsecured creditors, and ***MacDonald cannot be extricated from the Plan without impairing the rights of the unsecured creditors. In any event, it cannot be denied that a judgment in favor of the Trustees in this case would "impair, destroy, challenge, or invalidate the enforceability or effectiveness" of the Reorganization Plan at least insofar***

> ***as that Plan settles the amount, source and payment schedule of the obligation that is the subject of this lawsuit***. See Sure-Snap [Corp. v. State Street Bank & Trust Co.], 948 F.2d [869] at 870 [(2nd Cir. 1991)](claims "whose timely bringing may have affected the parameters of a bankruptcy repayment schedule cannot be re-litigated another day in another court").

124 F.3d at 91-92 (emphasis added). See also Sure-Snap, 948 F.2d at 872-73 (2nd Cir. 1991) (order confirming reorganization plan has preclusive effect under doctrine of res judicata); In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550 (11th Cir. 1990) ("This issue has been settled for some time: a bankruptcy court's order confirming a plan of reorganization is given the same effect as any district court's final judgment on the merits."); Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987) (creditor was barred from attacking the legality of confirmation in a collateral proceeding).

By nullifying the Bankruptcy Judgment and other portions of the Plan, the lower Courts effectively voided the entire Reorganization Plan, and Trendi's and other creditors' consideration for having agreed thereto. Such nullification in collateral proceedings is unheard of, and contrary to well-settled practice. Robertson v. Isomedix, Inc. (In re International Nutronics, Inc.), 28 F.3d 965, 969-71 (9th Cir.), cert. denied, 513 U.S. 1016 (1994) (*res judicata* bars antitrust claim by debtor against purchasers of debtor's property pursuant to sale approved by order of bankruptcy court); Hendrick v. Avent, 891 F.2d 583, 587 (5th Cir.), cert. denied, 498 U.S. 819 (1990) (dismissing RICO and fraud claims where

"the determination by the bankruptcy court [was] the final authorization of the transfer of title and the subsequent adversary proceeding [was] a direct challenge to that transfer of title" because "the proper medium for a challenge to the original bankruptcy court's order is through a direct challenge of that order"); Gekas v. Pipin (In re Met-L-Wood Corp.), 861 F.2d 1012, 1018 (7th Cir. 1988), cert. denied, 490 U.S. 1006 (1989) (affirming dismissal of fraud suit as impermissible collateral attack on bankruptcy court's order and "hold[ing] that confirmed sales–which are final judicial orders–can be set aside only under rule 60(b)"); Southmark Properties v. Charles House Corp., 742 F.2d 862, 870-72 (5th Cir. 1984) (*res judicata* barred breach of contract claims asserted by bankruptcy seller against purchaser of real estate pursuant to court-approved sale); FCC v. NextWave Pers. Communs., Inc., 537 U.S. 293 (2003) (upholding bankruptcy court's decision which voided FCC's cancellation of spectrum licenses).

The Lower Courts Negated Several Factual Findings By the Bankruptcy Court In An Impermissible Collateral Attack on a Confirmed Plan

For approving the Plan, the Bankruptcy Court made several findings of fact, which it was statutorily required to do. The lower Courts' decisions effectively negated several of these findings:

1. The Bankruptcy Court expressly found that each creditor or interested party had "accepted" the Plan or would "receive or retain" more than liquidation value, A-93a ¶11.

The lower Courts negated ***both*** prongs of this finding. First, Trendi's (and other creditors') acceptance was obviously conditioned on viability of the fourth party claims herein and if those claims were nullified, their acceptance is void for mutual mistake of an extremely material item. Wastak v. Lehigh Valley Health Network, 333 F.3d 120 (3rd Cir. 2003); Villines v. GMC, 324 F.3d 948 (8th Cir. 2003).

Second, Trendi and other creditors would certainly have received a much higher value if Indu Craft were to be liquidated under Chapter 7, and, the lower Courts made the Plan fail the "best interest of creditors test." Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship, 526 U.S. 434, 441 (1999); 11 U.S.C. §1129(a)(7)(A)(ii). Indisputably, Indu Craft would ***not*** have been discharged in a Chapter 7 liquidation, 11 U.S.C. § 727(a)(1), and would have continued to be liable to Trendi, whereupon Indu Craft could have recovered upon its claims against Baroda.

The Bankruptcy court also ordered

2. That a creditor, Tze Wung, give Indu Craft a loan of $500,000, which loan was secured by, *inter alia*, the proceeds herein, A-87a ¶5.1(c);
3. That Tze Wung "shall receive the first proceeds" of $500,000 from any recovery herein, A-87a¶(d);
4. That Trendi, and other class 5 holders "shall receive their net proceeds of any recovery" herein, after reimbursing Tze Wung for loans for pursuing the claims herein, A87a-88a¶5.2;
5. That Indu Craft's liability to Trendi would be determined by the Bankruptcy Court, and judgment would be entered in that amount, id.
6. Indu Craft "shall utilize the proceeds" of the New

Capital loan to pay for this litigation, A88a¶12.

Every one of the above provisions was effectively voided by the lower Courts' decisions. Moreover, the Bankruptcy Court also found that

7. That the Plan "complied with all applicable provisions of the Bankruptcy Code," A-92a, ¶4;
9. That the Plan had been proposed "in good faith and not by any means forbidden by law and viewed in the light of the totality of circumstances, . . . will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code," A-92a, ¶5; and
10. That the Plan is "consistent with the interests of creditors and equity holders and with public policy," A-92a ¶9;

Each of the above findings were rendered baseless by the lower Courts. This is manifestly inconsistent with settled law and practice.[3]

11. The actual discharge clause itself expressly provided that "***Except as otherwise provided*** in the Modified Plan or a Final Order of the Bankruptcy Court," any judgment on a discharged debt was "null and void and of no force and effect", A-96a F(1)(c) (emphasis aded). The specific provisions for funding the fourth party litigation herein, the security interests created, and the disbursements of proceeds therefrom, detailed above were clearly such clauses which provided "otherwise" – which provisions were negated by the decisions at issue.

Moreover, the confirmed Plan was a binding agreement between all parties, 11 U.S.C. § 1141(a); In re Pettibone Corp., 134 B.R. 349, 351-352 (Bankr. N.D. Ill.

1991) ("A plan of reorganization is a contract which binds a debtor and its creditors.").[4] As such, it is well-settled that a contract which confers certain rights or benefits in one clause will not be construed in other provisions completely to undermine those rights or benefits

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Ronnen v. Ajax Elec. Motor Corp., 88 N.Y.2d 582, 590, 648 N.Y.S.2d 422, 425, 671 N.E.2d 534, 537 (N.Y. 1996) (citing Two Guys from Harrison- N.Y. V. S.F.R. Realty Assocs., 63 N.Y.2d 396, at 405, 482 N.Y.S.2d 465, 472 N.E.2d 315 (N.Y. 1994); Premium Point Park Assn. V. Polar Bar, 306 N.Y. 507, 511, 119 N.E.2d 360 (N.Y. 1954). The lower Courts' decisions effectively negated months of strenuous negotiations between creditors and debtor, and nullified the ***clear and demonstrable*** intent of the bankruptcy court and the parties.

The significance of this petition can hardly be overemphasized, given the massive bankruptcy filings currently pending involving such multibillion dollar giants as Enron, Worldcom, and Adelphia. Each of these bankruptcies presumably involve tens of thousands of claims, creditors, and choses-in-action.[5] Permitting a court to re-interpret a Bankruptcy Court's considered, clear decisions and to unravel a duly confirmed reorganization plan is an invitation to chaos.

Where a Bankruptcy Court's Judgment Against a Debtor Is in Apparent Conflict with its Own Prior Order Approving the Reorganization Plan, That Apparent Conflict ***Must*** Be Resolved By the Same Bankruptcy Court In the First Instance

Indisputably, the bankruptcy court's jurisdiction over a debtor's properties "is paramount and exclusive." Brown v. Gerdes, 321 U.S. 178, 183-84 (1944) (citing Gross v. Irving Trust Co., 289 U.S. 342 (1933))[6]. As this

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[3]"[C]onfirmation of a plan of reorganization discharges the debtor firm all claims arising prior to the date of confirmation, subject to the following exceptions: . . .

To the extent that the plan or order of confirmation provides for payment of a claim, such claim is not discharged". Collier on Bankruptcy, ¶1141.01 (15th ed. 1994)).

[4]In re Ernst, 45 B.R. 700, 702 (Bankr. D. Minn. 1985) ("The plan is essentially a new and binding contract, sanctioned by the court, between the debtor and his preconfirmation creditors."); accord, In re Xofox Industries Ltd, 241 B.R. 541-543 (Bankr. E.D Mich. 1999); In re Herron, 60 B.R 82 (Bankr. W.D.La. 1986); In re St. Louis Freight Lines, Inc., 45 B.R. 546 551 (Bankr. E.D. Mich. 1984); In re Paradise Valley Country Club, 31 B.R. 613 (D.Colo. 1983).

[5]Bankruptcy filings have increased from 312,335 in the first quarter of 2000 to 440,257 in the second quarter of 2003. http://www.abiworld.org/stats/newstatsfront.html. (American Bankruptcy Institute).

[6]Accord, In re Union League Club of Chicago, 203 F.2d 381, 386 (7 Cir. 1953) (reorganization decree conclusive on questions which might have been raised as well as to those litigated); Murphy v. John Hofman Co., 211 U.S. 562 (1909) (De facto verdict for creditor in replevin action to obtain goods of debtor after bankruptcy was filed reversed because the action was an unlawful invasion of the bankruptcy court's jurisdiction which could not be disturbed by another court); United States Fidelity & Guaranty Co. v. Bray, 225 U.S. 205 (1912) (surety company's claims against

Court held over 160 years ago,

> In every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding.

Cocke v. Halsey, 41 U.S. 71, 87 (1842); accord, Harris v. Hardeman, 55 U.S. 334 (1853).

For example, in Wegner v. Grunewaldt, 821 F.2d 1317, 1320 (8th Cir. 1987), Wegner agreed to a buyout of his interest in BLT, and consented to BLT's transfer of its liquor license to a new corporation BLT II. His dues were secured by a security interest in BLT's liquor license. Meanwhile, Valley National Bank financed BLT II and took a security interest in the same assets. In bankruptcy proceedings of BLT and BLT II, the Bankruptcy Court held that Wegner's security interest, although filed prior in time, was subordinate to Valley National's because (a) under 9-306(2) of South Dakota's UCC, he authorized and consented to the transfer; and (b) as a BLT officer, he did not inform Valley National of his security interest, and hence, his interest was equitably subordinated. 821 F.2d at 1319-20. On appeal, the District Court rejected these findings, and held that Wegner authorized the sale on condition that he retain his security interest, and state law permitted the

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debtor's estate were "subjects for proceedings in bankruptcy and therefore fell within the exclusive jurisdiction of the court of bankruptcy")

security interest to continue in the transferred asset. 821 F.2d at 1320. On appeal, the Eighth Circuit reversed:

> If the bankruptcy court's factual findings are silent or ambiguous as to an outcome determinative factual question, the district court may not engage in its own factfinding but, instead, must remand the case to the bankruptcy court for the necessary factual determination.

Wegner, 821 F.2d at 1320 (citing In re Walker, 726 F.2d 452, 454-55 (8th Cir. 1984); In re Neis, 723 F.2d 584, 588-90 (7th Cir. 1983).

-Moreover, the issue there presented a serious inconsistency remarkably similar to the one here. As the Eighth Circuit explained, 821 F.2d at 1321:

> Yet, if we accepted the bank's argument, we would be forced to inconsistently conclude that when a secured party and a debtor agree that the debtor may sell the secured property and also agree that the security interest shall continue in the sold property, the first agreement is valid, the second is meaningless, and, despite the parties' manifestations, the secured party loses his property interest in the sold property. Not only would such an interpretation ignore the parties' intentions, it would also be at odds with section 9-306(2)'s policy of extending, not limiting, the protections Article 9 affords a secured party.
> Clearly, the interpretation of reorganization

plans, and the fate of specific claims or the debtors' properties therein, remains exclusively with the Bankruptcy Court. See, e.g., In re. Clipper International Corp., 154 F.3d 565, 568 (6th Cir. 1998) (only bankruptcy court could direct disbursement of dividend distribution from overpayment of premiums made pre-petition, and Michigan court's orders "cannot be accorded deference"); cf. Nichols v. Alker, 231 F.2d 68, 76 (2nd Cir. 1956) ("the express grant of such power to an enforcing court under the P.U.H.C.A., like the similar provisions in the Bankruptcy Act, strongly suggests Congressional intent to immunize enforcement decrees from such attack.").

Indeed, even where a bankruptcy court's decision is ***directly*** at issue in appeal before the District Court, settled law and practice requires that the District Court defer to the opinions of the Bankruptcy Court as the court of first instance. In re Lawrence, 293 F.3d 615, 625 (2nd Cir. 2002) ((emphasis added) ("discretion was constrained by an obligation to consider the views of the court that entered the original order.")

Here, the Bankruptcy Court approved a reorganization plan that indisputably did not intend to discharge Indu Craft of its liability to Trendi. The validity of the Plan or the enforceability of any orders entered therein were never at issue before the District Court. Nevertheless, the lower courts ran roughshod over the Bankruptcy Court by holding that orders confirming the Plan and discharging Indu Craft rendered meaningless parts of that very order, as well as the subsequent judgment in favor of Trendi. This re-interpretation impermissibly intruded on the exclusive jurisdiction of the Bankruptcy Court herein, and are a remarkable departure from usual course of judicial

proceedings.

B. The Decision Creates an Unprecedented Concept in Law, a Schizophrenic Judgment Which Is Valid as Against the Judgment Creditor And Void Against the Judgment Debtor

The lower Courts held that the Bankruptcy Judgment in favor of Trendi against Indu Craft was valid, so that Trendi ***must*** have that Judgment vacated in order to assert claims against Baroda. Simultaneously, they also held that the ***same*** Judgment was not ***"collecti[ble]"*** from Indu Craft, A-14a (emphasis in original).

In other words, according to this proposition, a judgment could be valid as against the judgment-creditor but void as against the judgment-debtor. The lower Courts did not cite or explain (and we could not find) any legal basis for such a schizophrenic judgment. This is a dangerous precedent for an unheard of concept with tremendous potential for mischief.

Axiomatically, a judgment ***must*** be either valid and enforceable, or invalid and unenforceable, ***as against both***, the judgment-creditor ***and*** the judgment-debtor. Holding it valid against one but invalid against the other converts it into a weapon for perverse legal consequences. Thus, if a judgment is invalid ***only*** as against the judgment-creditor, then a claim can be the subject of repeated litigation against the judgment debtor. And if the judgment is invalid ***only*** as against the judgment-debtor, then the judgment-creditor is left with a worthless piece of paper.

Of course, judgments are occasionally

uncollectible ***practically*** for want of assets. But to hold a judgment to be ***legally*** uncollectible is the same as holding it to be void, and the District Court's attempted distinction between "void" and "uncollectible" is "sheer sophistry", to borrow this Court's characterization in Nixon v. Administrator of General Services, 433 U.S. 425, 516 (1977).

II. The lower Courts' Decision Concerning Trendi's Direct Claims Against Baroda Directly Conflicts with the New York Court of Appeals' decision in ***Duffy V. Horton Memorial Hospital***

Duffy, 497 N.Y.S.2d 890, involved a medical malpractice action brought in August 1979 against the hospital in New York State court. In June 1981, the hospital brought a timely third-party action against Dr. Greenberg. After Dr. Greenberg's deposition was taken in October 1982, that plaintiff sought to amend the complaint to assert direct claims against him. Rejecting a challenge based on the statute of limitations, New York's highest court reasoned that if the "new defendant has been a complete stranger to the suit up to the point of the requested amendment," the claim might be barred. 497 N.Y.S.2d at 893, citing Arnold v Mayal Realty Co., 299 NY 57 (N.Y. 1949); Bringing in Party – Limitations, Ann., 8 A.L.R.2d 6, §§ 53, 58). However, where, within the statutory period, a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, and is, in fact, a participant in the litigation, permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations (Boyd v United States

Mtge. & Trust Co., 187 N.Y. 262, 270, [79 N.E. 999 [1907]]; cf. Williams v United States, 405 F2d 234, 236-237 [5th Cir. 1968]).

497 N.Y.S.2d at 893. Since Dr. Greenberg had been served with the third party complaint and "all prior pleadings in the action," he had "actual notice of the plaintiff's potential claim" when he was first brought in as a third party defendant by the original defendant, the hospital. 497 N.Y.S.2d at 893. Consequently, Dr. Greenberg had to "gather evidence and vigorously prepare a defense. There is no temporal repose." Hence, the New York Court of Appeals declared categorically:

a direct claim [could be] asserted against the third-party defendant, which, for the purposes of computing the Statute of Limitations period, relates back to the date of service of the third-party complaint.

497 N.Y.S.2d at 893 (citations omitted).

Here, Baroda had "actual notice" of Trendi's claims when Baroda was impleaded herein in 1990. It has been served with all pleadings herein, it knew that it had to gather evidence (and did so), and had to prepare a defense. Indisputably, Baroda has done so, and launched a vigorous defense. Thus, no serious question can exist that had this case proceeded in New York courts, Trendi's claim would have been upheld as timely. Nevertheless, the lower Courts held otherwise, and refused to relate them back.

The District Court was exercising Diversity Jurisdiction here. Indisputably, as such, it was "in effect, only another court of the State" which could not "substantially affect the enforcement of the right as given by the State." Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945); accord, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). As this Court declared categorically,

[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."

Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 (1996) (quoting Guaranty Trust Co. of N.Y., 326 U.S. at 109 and citing Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949). See also Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202 (1956) (Even "Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases"). The lower Courts' refusal to relate back Trendi's direct claims against Baroda (the Second Third Party Complaint) was directly in conflict with Duffy.

The Lower Courts' Decision Creates Three Different Statutes of Limitations for the Same Claim under Rule 14, Depending Entirely on Whether The Claims Are Formally Asserted, and If So, How

A third party plaintiff may recover from the fourth party defendant in 3 ways. Firstly, it ***need not*** assert such a claim formally, but may still recover. Project Hope v. M/V Ibn Sina, 250 F.3d 67, 76-77 (2nd Cir. 2001) ("a formal amendment of a plaintiff's complaint asserting causes of action against a party impleaded under Rule 14(a) is unnecessary if the third-party is effectively on notice that it will be held liable on the plaintiff's claims and the two proceed against one another in an adverse manner"); accord, Wasik v. Borg, 423 F.2d 44, 46 (2nd Cir. 1970); Falls Indus., Inc. v. Consolidated Chem. Indus., Inc., 258 F.2d 277, 287 (5th Cir. 1958).

Here, Baroda was "effectively on notice" since 1990 that it would be held liable for Trendi's claims. Baroda and Trendi have always proceeded against one another in an adverse manner, right from Baroda's motion for stay or dismissal in 1990.[7] Thus, Baroda could be held directly liable to Trendi even if Trendi had ***not*** asserted a claim directly.[8] No question of statute of

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[7]For example, Trendi filed papers in opposition, and argued against, Baroda's motion for dismissal of Indu Craft's fourth party complaint. Trendi has appealed against the January 17th decision, and Baroda has sought dismissal of that appeal in this Court. Trendi filed direct claims against Baroda, A621.70, which are at issue. Similarly, earlier, Trendi had appealed against the lower Court's order granting Baroda's motion for summary judgment on grounds of res judicata. Baroda moved for dismissal of that appeal, and to strike Trendi's brief. In fact, Trendi and Baroda have always been on opposing sides in this action, whose thrust was always the recovery from Baroda of damages suffered by Trendi.

[8]No serious question can exist that Baroda had all the evidence concerning Trendi's damages, had conducted discovery concerning the same, and had bent over backwards to prevent litigation on the merits or recovery thereon. As the Second Circuit

limitations could arise at all.

Secondly, the third party plaintiff may formally assert a direct claim against the fourth party defendant without amending its pleading, Rule 14, Fed. R. Civ. P. In such case, as a corollary to settled law permitting direct recovery by a plaintiff against an impleaded third party, courts have related back such claims to the original impleader of the fourth party. For example, in Trace X Chemical, Inc. v. Gulf Oil Chemical Co., 724 F.2d 68 (8th Cir. 1983), cert denied, 469 U.S. 1160 (1985), Trace X sued Gulf Oil in January 1978 for the supply of defective TNT. Gulf asserted third party claims against its supplier, CIL, on July 18, 1980, but these claims were dismissed for want of personal jurisdiction. On March 12, 1981, Trace X asserted direct claims against CIL, which were beyond the 4-years prescribed under statute of limitations. However, the District Court held, the complaint against CIL was not time-barred because Trace X's claims against CIL "related back to the date of its January 26, 1978, complaint" against Gulf Oil. 724 F.2d at 70. The Eighth Circuit upheld this ruling. Id.

So also, Northbrook National Vending Co. v. J & R. Vending Corp., 167 F.R.D. 643 (E.D.N.Y. 1996), involved a diversity subrogation action for damages resulting from a fire on premises of Northbrook's insured (Tiffen) on April 2, 1993. Northbrook sued J & R, and, after 4 derivative claims in series, sought to assert claims against the fifth party defendant Robertshaw directly. Like Trendi here, Northbrook asserted "a direct claim against the third-party

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itself previously held, Trendi's damages had been deprived of a day in court, Baroda Bank Of India v. Trendi Sportswear, Inc., 239 F.3d 428 (2nd Cir. 2000).

defendant in a new pleading," 167 F.R.D. at 647. Robertshaw opposed Northbrook's claims on grounds of statute of limitations. The Court rejected this on grounds that, inter alia, an otherwise time barred claim could survive based on the "relation back" doctrine. As here, New York law applied to those claims, and New York law permitted such relation back. 167 F.R.D. at 648 (citing Duffy, 497 N.Y.S.2d 890, and Hemmings v. St. Mark Housing Association. L.P., N.Y.L.J. May 31, 1996 p. 28 cols. 3-4 (N.Y. Sup. Ct. Kings Co. 1996)). Since Robertshaw could demonstrate no prejudice, Northbrook's claims were not time-barred. 167 F.R.D. at 648.[9]

Here, Trendy formally asserted direct claims against Baroda based upon the same transactions as Indu Craft. However, the lower courts held that such a direct claim can be asserted only ***before*** the statute of limitations had run on Trendi's direct claims themselves, although Indu Craft's claims were timely. A-12a.[10]

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[9]See also Meredith v. United States, 41 F.R.D. 34 (S.D. Cal. 1966); Dysart v. Marriott Corp., 103 F.R.D. 15 (E.D. Pa. 1984); 6 C. Wright & A. Miller, Federal Practice & Procedure § 1498 (1971). Cfr., 131 Main St. Assocs. v. Manko, 897 F. Supp. 1507, 1521 (S.D.N.Y. 1995) ("Given that the added plaintiffs' claims in this case are identical to those of the original plaintiffs, defendants have not been prejudiced in their ability to mount a defense. The claims of the late-comer plaintiffs are therefore timely"); Koal Indus. Corp. v. Asland, S.A., 808 F. Supp. 1143, 1157 (S.D.N.Y. 1992) ("plaintiffs have been allowed to add or substitute parties where there is an extremely close corporate or other relationship between the original and the added defendant," (quoting 3 J. Moore, Moore's Fed. Practice, ¶15.08[5] (1992)).

[10]

This despite the Court acknowledging that Rule 14 (a) "does not impose a time limit within which the plaintiff must assert any claims that it may have against the third-party defendant." A-12a.

Third, a third-party defendant may amend the third-party complaint to assert a direct claim against the fourth party defendant. This option is clear from the advisory committee's notes:

> [T]he plaintiff may, if he desires, assert directly against the third-party defendant ***either by an amendment or by a new pleading*** any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

Rule 14, Advisory Committee's Notes, 1946 Amendment (emphasis supplied).

Here, the lower courts held that Trendy could not amend its third-party complaint in this action because of the Bankruptcy Judgment. That Judgment precluded amendment, and thence, the applicability of Rule 15 (c); hence, the Doctrine of Relation Back would not apply, according to the lower Courts.

Simply put, by the lower Courts' decisions, a third party's direct claims under Rule 14 against a fourth party defendant would be time-barred depending ***entirely*** on the form in which the claims were asserted:

1. If the claims were not asserted formally at all, they would not be time-barred in view of the fourth party claims;
2. If they were asserted by way of an amendment to the third party complaint, they would relate back to the fourth party complaint; but
3. If they were asserted by way of a direct pleading,

they would have to be independently timely.

This applicability of statutes of limitations is an important question off a federal law which should be settled by this court. The decisions at issue elevate form over substance, directly contrary to this Court's repeated admonition that "federal courts must not privilege form over substance." Carey v. Saffold, 536 U.S. 214, 202 (2002); accord, Mitchell v. Helms, 530 U.S. 793, 818 (2000).

CONCLUSION

For the foregoing reasons, Trendi's Petition for a Writ of Certiorari should be granted.

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